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IN THE
Supreme Court of the United States
October Term, 1987

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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NEW ORLEANS PUBLIC SERVICE INC.,
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THE COUNCIL OF THE CITY OF NEW ORLEANS,
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On Writ of Certiorari To The United States
Court of Appeals For The
Fifth Circuit

**BRIEF OF THE NATIONAL ASSOCIATION
OF REGULATORY UTILITY COMMISSIONERS
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as amicus curiae urging affirmance

due to the substantial harm reversal of the decision below may have upon the regulation of public utilities by its member State regulatory commissions. The NARUC files this brief with the written consent of the Petitioner and the Respondents.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands engaged in the regulation of utilities and carriers. The Council of the City of New Orleans, Respondent herein, is an Associate Member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains State and local officials charged with the

duty of regulating natural gas, electric and communications utility companies operating within their respective jurisdictions. As such, these officials have the obligation to assure the establishment and operation of utility companies which serve the public interest. This means that State and local regulators must, under law, seek to ensure that dependable and safe utility service is provided consumers at rates which are just, reasonable and nondiscriminatory.

In the decision herein under review, the United States Court of Appeals for the Fifth Circuit held that the United States District Court, Eastern District of Louisiana, had not abused its discretion in abstaining from deciding Petitioner's claim that the Council of the City of New Orleans' decision fixing the retail rates it may charge its customers was preempted by an earlier decision of the Federal

Energy Regulatory Commission.[1] Petitioner New Orleans Public Service Inc. (NOPSI), a utility selling electricity to retail consumers in the City of New Orleans, has appealed the Fifth Circuit's decision to this Court on the ground that the District Court may not refuse to adjudicate its preemption claim, despite the fact that the State of Louisiana maintains a regulatory and judicial system capable of hearing and deciding all of its claims--Federal as well as State. Specifically, NOPSI argues that once the Federal Energy Regulatory Commission (FERC) had issued a ratemaking order applicable to the wholesale sale or allocation of electricity, the Federal courts cannot refuse to hear the utility's

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[1] The decision of the Fifth Circuit appears at Appendix 1A of the Petition for Writ of Ceriorari. This decision has been reported at 850 F.2d 1069. The decision of the District Court, which is unreported, appears at Appendix 21A of the Petition for Writ of Ceritiorari. Subsequent reference will be made to these decisions as they appear therein in this form: App. at ___.

allegations that State or local commission treatment of that wholesale rate in a subsequent retail rate proceeding is preempted.

If adopted by this Court, Petitioner's argument would substantially disrupt the systems of regulation and judical review in an area of State concern recognized as vital is past decisions of the Supreme Court: State regulation of the retail rates and services of public utilities. Under the Constitution, the State courts are fully capable of reviewing the decisions of State and local regulatory bodies, including any issues of preemption which might be raised therein. Petitioner, however, would have this Court endorse an alternative avenue of judicial review which could enable utilities such as NOPSI to invoke the jurisdiction of the Federal District Courts in frequent, potentially piecemeal litigation involving issues at

the heart of the retail ratemaking process. Current ratemaking practices, however, depend upon the maintenance of regularized judicial review procedures in which retail ratemaking decisions are considered in whole by State courts with a right of final appeal to this Court. The NARUC's interest in addressing the impact of Petitioner's arguments on the practices and procedures of its member commissions is strong, compelling its participation in this case.

SUMMARY OF ARGUMENT

By its actions throughout the proceedings which have resulted in this case coming to this Court, NOPSI has sought to legitimize a system for the judicial review of local and State regulatory decisions which would enable any utility--be it electric, communications or natural gas--to have its choice of a State or Federal forum in which to make its case.

Rather than pursue its available remedies in the courts of the State of Louisiana, NOPSI has sought Federal court intervention in its dispute with the Council of the City of New Orleans (the Council) over the rates it may lawfully charge its customers for the retail sale of electricity. NOPSI claims, of course, that its reliance on the preemptive value of this Court's decision in Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S.____, 101 L.Ed2d 322 (1988) precludes a Federal District Court from invoking the equitable doctrine of abstention to refuse to decide the federal issues raised in the company's complaint.

The NARUC respectfully submits that the District Court, as affirmed by the Court of Appeals, properly refused to afford utilities like NOPSI their preferred Federal forum to resolve issues of essentially local impact. Contrary to

NOPSI's assertions, the issues involved in this case implicate substantial State interests which a reversal of the Court of Appeals' decision would harm substantially. We wish to make two points in this regard: first, that the abstention doctrines developed by this Court over the last forty years recognize and affirm the fact that we enjoy a governmental system based upon "Our Federalism", and that therefore, the Federal Courts must not unduly interfere with the activities of the States, particularly where, as here, such interference would occur in an area involving complex regulatory programs lying at the core of the State's exercise of its police powers to protect its citizenry.

Second, as this Court quite recently recognized, regulation of electric utilities is on the cusp of major, perhaps revolutionary, change. Duquesne Light Co. v. Barasch, 488 U.S.___, 102 L. Ed.2d 646,

662 n. 10 (1989). The "emergent market for wholesale electric energy" described in Duquesne Light can only be expected to render the complexities of State regulation of retail service even more complex. Inevitably, the next few years will witness substantial State commission experimentation with new policies and procedures (e.g. competitive bidding for the acquisition of new generating capacity) which will not readily suffer the interference of Federal court review of "federal issues" which are inextricably bound up in emerging State resource acquisition policies. The Court's decision in Duquesne Light recognizes and affirms the need for regulatory flexibility in the development of ratemaking methodologies, which in all likelihood will implicate "federal issues"of the sort raised by NOPSI, free from prescription or prohibition by the Federal courts. Through

its analysis of the principles of abstention, the Court of Appeals properly affirmed the policies of noninterference enshrined in "Our Federalism" and therefore, should be affirmed.

ARGUMENT

In the decision before the Court, the Fifth Circuit found no abuse of discretion in the District Court's decision to abstain from excercising jurisdiction over NOPSI's claim that the Council's decision to disallow the recovery of certain costs in retail rates on the grounds of the utility's imprudence was preempted. App. at 20A. Relying upon both Burford[2] and Younger[3] abstention, the Court of Appeals held that the District Court could properly find that the exercise of Federal court

[2]Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[3]Younger v. Harris, 401 U.S. 37 (1971).

jurisdiction "would interfere with the state regulatory system" (App. at 17A), and further, that NOPSI "had an adequate opportunity to litigate its federal claims" in ongoing judicial proceedings in State court (App. at 18A), and that therefore, abstention was not an abuse of discretion.

In its brief to this Court, NOPSI argues that neither Burford or Younger provides a proper basis for the Fifth Circuit's affirmance of the District Court's ruling.[4] While acknowledging that its claim of preemption under the Federal Power Act, 16 U.S.C. sec. 824 et seq. (1982), is now pending in State court (NOPSI Br. at 15), NOPSI asserts that it is entitled to a Federal forum to litigate this claim because, inter alia, there are no important State interests implicated in this litigation. NOPSI Br. at 20-21. In

[4]Reference to the NOPSI Brief will be in this form: "NOPSI Br. at ___".

its brief on the merits, the Council has shown that the Fifth Circuit's ruling on the law of abstention is correct, and should not be reversed. Herein, the NARUC disputes the utility's claim that there are no important or legitimate State interests at stake in this case, and further, seeks to provide some insight on the disruptive effect Federal court intervention will have on State regulation of the retail rates and services of electric utilities.

THE COUNCIL'S REGULATION OF NOPSI'S RETAIL RATE LEVELS, INCLUDING ITS TREATMENT OF THE UTILITY'S PRUDENCE, ENCOMPASS IMPORTANT STATE AND LOCAL INTERESTS

As this Court has recently acknowledged, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 377 (1983). This Term, the Court has

reaffirmed the constitutional principle that in discharging this important function, the States have broad authority to "decide what rate-setting methodology best meets their needs in balancing the interests of the utility and the public." Duquesne Light, supra, 488 U.S. at ___, 102 L. Ed.2d at 663. Therein, the Court observed that retail ratemaking is a difficult undertaking, requiring the consideration of a multitude of factors: "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result." Id., 102 L. Ed. 2d at 646.

In addition, in a recent decision relied upon heavily by NOPSI, the Court has stated that even in cases in which State and local commissions are reviewing the passthrough of wholesale purchased power costs approved by the FERC, the "economic judgments" that these commissions are

entitled to make may well include the reasonableness of the "quantity of power procured from a particular source. . .if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price." Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 972 (1986) (Emphasis in original). In Mississippi Power & Light, supra, (MP&L), the decision upon which NOPSI bases much of its case, the Court again acknowledged that State jurisdiction to review the reasonableness of a utility's power purchases would not necessarily be preempted "if [the utility] had the legal right to refuse to buy that power." 487 U.S. at ___, 101 L. Ed.2d at 340.

The issue underlying the Council's review of NOPSI's retail rates is not whether the utility had the right to refuse to buy power generated by the Grand Gulf

plant, but rather, what responsibility the company had to deal with the growing risks of the project at the time options were available to reduce those risks. App. at 9A, 13A. Relying on MP&L, NOPSI asserts that the Council is unquestionably foreclosed from determining this question, and that the Fifth Circuit's finding that the resolution of this issue is not consigned to "federal exclusivity" (App. at 14A) is erroneous. NOPSI Br. at 21-22. While acknowledging the availability of State court review of the Council's resolution of this issue with final review in this Court, NOPSI claims that its "federal rights" can only be vindicated through the equitable powers of the lower Federal courts. Id. at 21.

Contrary to NOPSI's assertions, the case does involve important State interests

of the sort considered crucial in Burford[5] and Younger[6]. As described supra at 12-14, this Court has never doubted the importance

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[5] In Burford v. Sun Oil Co., supra, the Court reviewed a District Court decision which dismissed a challenge to an order of the Texas Railroad Commission on the grounds that the parties should pursue the litigation in the Texas courts. The Court affirmed, noting the Railroad Commission's plan of regulation was "of vital interest to the general public" (319 U.S. at 324), and directed that the federal questions raised in the case be litigated through the State court system with final review in the U.S. Supreme Court. Id. at 334. The Court was clearly concerned that piecemeal review of individual Railroad Commission decisions by Federal courts (when Texas had an adequate State court system) would disrupt the State's regulatory program. Id.

[6] In Younger, supra, the Court reversed a District Court order enjoining a State criminal prosecution of the crime of criminal syndicalism. 401 U.S. at 40. The Court determined that despite the Federal government's interest in protecting Federal rights, Federal court jurisdiction should not "unduly interfere with the legitimate activities of the States." Id. at 44. In subsequent decisions, the Court has expanded the Younger doctrine to include, inter alia, ongoing State administrative proceedings, Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), and State civil proceedings, Juidice v. Vail, 430 U.S. 327 (1977).

of State regulation of the retail rates of electric utilities, even in cases in which preemption of such State regulation was ultimately found. Indeed, as the Fifth Circuit described, regulation of retail rate levels, as well as generation facilities and intrastate transmission, falls on the State side of the "bright line" described by this Court in FPC v. Southern California Edison Co., 376 U.S. 205, 215 (1964), thereby establishing a "dichotomy of supervision" that will occasionally and foreseeably result in conflicts between State and Federal jurisdiction. App. at 14A. A "dichotomy of supervision", however, does not diminish the State's interest in the impact of Federal policies on retail service, as this Court recognized when it upheld a State decision to ban nuclear plant construction, an issue of pervasive Federal regulation, on the basis of the State's concern with

the with the cost of nuclear waste disposal. Pacific Gas and Electric Co. v. State Energy Resources Commission, 461 U.S. 190 (1983).

The fact that these seemingly inevitable conflicts will occur does not mean, however, that State or local regulatory bodies forfeit their legitimate interest in protecting their citizens from exploitive utility pricing policies simply because the utility alleges a "federal right" to the recovery of its purchased power costs. Nor does it mean that State courts should be ousted from their traditional role of reviewing questions of both State and Federal law raised in State commission rate orders.

As the language quoted from Nantahala and MP&L, supra at 13-14, indicates, this Court has not precluded all State review of whether or not it is reasonable to permit a utility to pass through to retail

ratepayers FERC-approved purchased power costs and allocations.[7] Indeed, the Court has never ruled on the merits of the specific issue that NOPSI seeks to litigate in Federal court: whether or not State or local regulatory agencies may find a utility to have acted imprudently by failing to attempt to resell an allocation of purchased power approved by the FERC. Because that specific issue has not been resolved, NOPSI cannot fairly claim, nor accurately predict, that this Court would inevitably preempt the Council's careful and extensive rate order once the issue came to the Court on the merits. If the issue is not finally settled--and it is not--NOPSI can hardly claim that there are only Federal issues at stake in this case for the simple reason that a final decision

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[7] See Nantahala, supra, at 972, citing Pike County Light & Power Co. v. Pennsylvania Public Utility Commission, 465 A.2d 735 (1983).

on the merits upholding the Council's exercise of jurisdiction would firmly establish the Council's legitimate interest in determining why NOPSI failed to reduce the risks it faced with respect to Grand Gulf as it once acknowledged it could. App. at 10A.

Of course, the merits of this issue are not before this Court, but rather, are now before the courts of the State of Louisiana. NOPSI Br. at 15. NOPSI does not, and fairly cannot, claim that the Louisiana court system is incapable of hearing and resolving its claim of Federal preemption. Id. Indeed, many of the preemption cases decided by the Court in recent years in the electric utility regulatory sphere have been litigated through the State court system.[8] Prior to

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[8] MP&L, supra, Duquesne Light, supra, Arkansas Electric Cooperative, supra, and Nantahala, supra, each involved Supreme Court review of State court rulings. In Duquesne Light and Arkansas Electric Cooperative, State court decisions involving federal questions were upheld.

this Court's decision in Nantahala, the major ruling on the question of State jurisdiction to regulate the passthrough of FERC-approved purchased power costs was the Rhode Island Supreme Court's Narragansett decision.[9]

In sum, the case before the Court as it now stands involves the following salient aspects: the specific issue of Federal preemption that NOPSI wishes to litigate in Federal court is a matter of first impression which neither this Court nor any other Federal court has yet addressed; the courts of the State of Louisiana are competent to hear and decide this preemption issue; NOPSI has the opportunity to litigate its claim in State

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[9] Narragansett Electric Co. v. Burke, 119 R.I. 559, 381 A.2d 1358 (1977), cert. den., 435 U.S. 972 (1978). Here, the Rhode Island Court found its State commission's jurisdiction to be preempted due to FERC wholesale regulation.

court, and indeed is now so doing; and the final outcome of the litigation on the prudence issue will directly affect the retail ratepayers of the City of New Orleans, in whose behalf the Council exercises its ratemaking authority. In light of these factors, the Fifth Circuit balanced the importance and strength of the Federal claims alleged by NOPSI against the important regulatory interests of the Council, and concluded that the District Court's decision to abstain was proper. In light of these same factors, this Court should affirm the decision below.

- The Court should affirm for the additional reason that Federal court involvement in State ratemaking decisions will serve to disrupt the development of new State regulatory policies and procedures. At the end of its decision in Duquesne Light, the Court alluded to impending changes in the structure of the

electric utility industry which will inevitably affect regulation of retail rates and services. Beginning in 1978 with the passage of Section 210 of the Public Utility Regulatory Policies Act of 1978, codified at 16 U.S.C. sec. 824a-3 (1985)(PURPA), policies at both the Federal and State levels have begun to erode the monopoly characteristics of electric utility control of generating capacity.[10] PURPA reduced barriers to entry which had previously prevented non-utility cogenerators and small power producers from selling power into electric distribution markets. In recent years, the FERC has proposed to reduce its wholesale regulation of so-called independent power producers--non-utility generators with no distribution

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[10] See Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 750-751 (1982) for a description of the deregulatory goals of PURPA.

facilities or retail customers.[11] This FERC initiative, which is pending at the Commission, reflects the development of new methods of regulation at the State level which seek to inject greater competition into generating markets. State commissions have begun to experiment with competitive bidding systems in which utilities conduct auctions to acquire access to third-party generating capacity for service to retail consumers.[12] Patterned on PURPA, these State bidding programs seek to encourage utilities to consider third-party producers in order to acquire incremental generating capacity at the lowest available cost.[13]

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[11] See Notice of Proposed Rulemaking, Regulations Governing Independent Power Producers, IV F.E.R.C. Stats. & Regs. para. 32,456, 53 Fed. Reg. 9327 (1988).

[12] See Notice of Proposed Rulemaking, Regulations Governing Bidding Programs, IV F.E.R.C. Stats. & Regs. para. 32,455, 53 Fed. Reg. 9324 (1988).

[13] See Griggs, Competitive Bidding and Independent Power Producers: Is Deregulation Coming to the Electric Utility Industry?, 9 Energy L.J. 415 (1988).

Necessarily, these complex new State initiatives will require a period of experimentation. Further, because many of these programs involve efforts to rely upon the growing number of competitors in wholesale power markets, new State resource acquisition plans can be expected to raise "federal issues", including questions involving the reasonableness of passing through the costs of bulk power purchases in retail rates.

There can be little doubt that the potential for piecemeal review in Federal District Court of such "federal issues" will disrupt the efforts of the State commissions to manage the impending transition to more competitive power markets. Should the Court reverse in this case, State commissions in the process of developing bidding systems will be exposed to Federal court challenge not only from

traditional utilities like NOPSI, but also from a host of third party producers alleging violations of their Federal rights, hindering the States' ability to develop coherent regulatory programs.

In Duquesne Light, the Court concluded its opinion by stating that "[t]he Constitution within broad limits leaves the States free to decide what rate-setting methodology best meets their needs in balancing the interests of the utility and the public." 488 U.S. at ___, 102 L. Ed.2d at 663. We respectfully urge the Court to affirm the decision below to preserve the flexibility necessary for the States and their regulatory bodies to regulate in the public interest free from the specter of Federal injunction.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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